REMARKS

An Office Action was mailed in the above-captioned application on May 6, 2004. In such Office Action claim 11 was pending. Claim 11 was finally rejected. This Amendment and Remarks document is submitted in response to said Office Action.

The Final Rejection

The rejection of the pending has been made final. Applicant notes, however, that the Examiner has cited new art, Schmidl, U.S. Patent No. 5,504,072, and that a new ground of rejection is based on this reference. Applicants submit that the new ground of rejection was necessitated not by Applicants' amendments, but rather by the Examiner's discovery of the Schmidl reference, since the current rejection of Claim 11 under 35 U.S.C. § 103(a) as being obvious over Schmidl could have been made by the Examiner prior to the previous amendment. In such case, a final rejection would not be proper. M.P.E.P. § 706.07(a). For this reason, Applicants ask that the finality of the Office Action be withdrawn.

The Rejection under 35 U.S.C. § 102(b)

The Examiner has rejected Claim 11 under 35 U.S.C. § 102(b) as being anticipated by Blackburn, US Patent No. 4,528,197. The Court of Appeals for the Federal Circuit has stated that anticipation requires the presence in a single prior art reference of each and every element of the claimed invention. *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1458 (Fed. Cir. 1984); *Alco Standard Corp. v. Tennessee Valley Auth.*, 1 U.S.P.Q.2d 1337, 1341 (Fed. Cir. 1986). "There must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention." *Scripps Clinic v. Genentech Inc.*, 18 U.S.P.Q.2d 1001, 1010 (Fed. Cir. 1991) (citations omitted). As explained below, Applicant believes that claim 11, as amended, is not anticipated by the prior art relied upon by the Examiner.

Applicant believes that Claim 11, as written, is not anticipated by the Blackburn reference. In the interest of expediting prosecution, however, Claim 11 has been amended, as suggested by the Examiner, to refer to "a patient having dementia of Alzheimer's type, or other loss of cognitive function caused by reduced neuronal metabolism."

Reconsideration is respectfully requested.

The Rejection under 35 U.S.C. § 103(a)

The Examiner has rejected Claim 11 under 35 U.S.C. § 103(a) as being unpatentable over Schmidl, et al., U.S. Patent No. 5,504,072 in view of JP 06-287138. The Examiner bears the burden of establishing a prima facie case of obviousness (Section 103). In determining obviousness, one must focus on Applicant's invention as a whole. *Symbol Technologies Inc. v. Opticon Inc.*, 19 U.S.P.Q.2d 1241, 1246 (Fed. Cir. 1991). The primary inquiry is:

> whether the prior art would have suggested to one of ordinary skill in the art that this process should be carried out and would have had a reasonable likelihood of success . . . . Both the suggestion and the expectation of success must be found in the prior art, not in the applicant's disclosure.

In re Dow Chemical, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988). The rejection states that Schmidl teaches a composition containing MCT prodrugs, or long chain fatty acids that can be metabolized to MCTs. Applicant respectfully disagrees with this assertion. Schmidl, et al. may teach a composition comprising MCTs, however, Schmidl, et al., does not teach any form of MCT prodrug. The assertion that long chain fatty acids can be metabolized to MCTs is not supported by Schmidl. The Examiner can not rely on general conclusions of "basic knowledge" or "common sense." Rather, evidence is required. *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002).

Furthermore, there is no motivation to combine Schmidl and JP 06-287138. Schmidl teaches compositions which are nutritionally balanced and which provide complete nutritional support for critically ill patients (col. 3, lines 11-16). JP 06-287138 is concerned with another field altogether, which is the treatment of Alzheimer's disease. Furthermore, the compositions of Schmidl contain about 65-80% carbohydrates (col. 4, lines 41-42). Veech, U.S. Patent 6,316,038 teaches treatment of Alzhiemer's disease by administering ketone bodies or their precursors (col. 5, lines 11-15). Veech also teaches that the administration of triglycerides can increase blood ketones, but only when carbohydrate intake is restricted (col. 9, lines 62-65), for example, by feeding an individual a ketogenic diet with a carbohydrate content of 20% or less. Thus the prior art teaches that the high-carbohydrate compositions of Schmidl, et al. (65-80% carbohydrates), would be ineffective in raising blood ketones, and therefore in treating Alzheimer's disease by the present method.

Reconsideration is respectfully requested.

Closing Remarks

Applicant believes that the pending claims are in condition for allowance. If it would be helpful to obtain favorable consideration of this case, the Examiner is encouraged to call and discuss this case with the undersigned.

The front page of the Office action indicates that the period for reply is a shortened statutory period of one month; however, the last page of the Office action indicates that the period for reply is a shortened statutory period of three months. Applicant assumes that the three month period is the correct time period and is enclosing a petition and payment for an extension of time of one additional month.

This constitutes a request for any needed extension of time and an authorization to charge all fees therefore to deposit account No. 19-5117, if not otherwise specifically requested. The undersigned hereby authorizes the charge of any fees created by the filing of this document or any deficiency of fees submitted herewith to be charged to deposit account No. 19-5117.

Respectfully submitted,

Date: August 10, 2004

Darla G. Yoerg, #48,053
Swanson & Bratschun, L.L.C.
1745 Shea Center Drive, Suite 330
Highlands Ranch, Colorado 80129
Telephone: (303) 268-0066
Facsimile: (303) 268-0065

S:\CLIENT FOLDERS\ACCERA\ACC01\UTILITY\OA RESP4.DOC